

04-2336 (SEC)

RECEIVED &amp; FILED

04 DEC -2 AM 8:23

AO 243 (Rev. 2/95)

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY

<b>United States District Court</b>		District <b>Puerto Rico</b>
Name of Movant <b>Deri Ventura Garcia</b>	Prisoner No. <b>16162-069</b>	Case No. <b>97-00082-SEC</b>
Place of Confinement <b>Federal Correctional Institution Edgefield, P.O. Box 725, Edgefield, SC 29824</b>		
UNITED STATES OF AMERICA                      V. <b>Deri Ventura Garcia</b> (name under which convicted)		
<b>MOTION</b>		
1. Name and location of court which entered the judgment of conviction under attack <u><b>U.S. District Court</b></u> <u><b>for the District of Puerto Rico, San Juan, Puerto Rico</b></u>		
2. Date of judgment of conviction _____		
3. Length of sentence <u><b>Count One 240 Months &amp; 3 years Supervised Release</b></u>		
4. Nature of offense involved (all counts) <u><b>Drug Conspiracy</b></u> _____ _____ _____		
5. What was your plea? (Check one) (a) Not guilty <input checked="" type="checkbox"/> (b) Guilty <input type="checkbox"/> (c) Nolo contendere <input type="checkbox"/>  If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____ _____ _____		
6. If you pleaded not guilty, what kind of trial did you have? (Check one) (a) Jury <input checked="" type="checkbox"/> (b) Judge only <input type="checkbox"/>		
7. Did you testify at the trial? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>		
8. Did you appeal from the judgment of conviction? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		

AO 243 (Rev. 2/95)

9. If you did appeal, answer the following:
- (a) Name of court First Circuit Court of Appeal
- (b) Result Conviction and Sentence Affirmed
- (c) Date of result August 22, 2003
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any federal court?  
Yes ☐ No ☐
11. If your answer to 10 was "yes," give the following information:
- (a) (1) Name of court \_\_\_\_\_
- (2) Nature of proceeding \_\_\_\_\_
- (3) Grounds raised \_\_\_\_\_
- (4) Did you receive an evidentiary hearing on your petition, application or motion?  
Yes ☐ No ☐
- (5) Result \_\_\_\_\_
- (6) Date of result \_\_\_\_\_
- (b) As to any second petition, application or motion give the same information:
- (1) Name of court \_\_\_\_\_
- (2) Name of proceeding \_\_\_\_\_
- (3) Grounds raised \_\_\_\_\_

AO 243 (Rev. 2/95)

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result \_\_\_\_\_

(6) Date of result \_\_\_\_\_

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☒(2) Second petition, etc. Yes ☐ No ☒

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.

AO 243 (Rev. 2/95)

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

- A. Ground one: Whether the District Court erred in sentencing petitioner to harsher sentence in a multi-drug conspiracy with varying penalties in light of general verdict.

Supporting FACTS (state *briefly* without citing cases or law): It is readily apparent from the record, that there was a multi-drug conspiracy, cocaine, heroin, and marijuana, no special verdict request, a general verdict on that count, and the imposition of the harsher sentence of the three drugs, violating petitioner's rights to Due Process.

- B. Ground two: Ineffective Assistance of Appellate Counsel

Supporting FACTS (state *briefly* without citing cases or law): Petitioner's appeals show only one issue, that the district court erred in denying petitioner's motion for new trial. There were several issues that had merit and deserved litigation on appeal.

- C. Ground three: Whether Appellate Counsel was ineffective and the district court erred by automatically attributing the drug quantity as-a-whole to Petitioner without specific individualized findings.

Supporting FACTS (state *briefly* without citing cases or law): The record will reflect that the district court shifted the drug amount (and kind) as a whole to petitioner without first making specific individualized finding as to drug amounts to petitioner.

AO 243 (Rev. 2/95)

- D. Ground four: Whether Appellate counsel was ineffective for failing to raise the issue of speculative drug amounts without identifying kind or quantity by the jury.

Supporting FACTS (state *briefly* without citing cases or law): The record will show that the court speculated as to drug kind and quantity when making base offense calculations without identifying the drug that was the object of the drug conspiracy. Counsel was ineffective for failing to raise this issue.

(Continued)

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: \_\_\_\_\_

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?  
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Lydia Lizarribar-Masini, 14 O'Neill St. Suite A.  
Hato Rey, PR 00918

(b) At arraignment and plea \_\_\_\_\_

(c) At trial Same

(d) At sentencing Same

GROUND E: Whether District Court's finding of drug amount and kind based on facts not found by the jury violated his right to have every element essential to punishment to be found beyond a reasonable doubt.

SUPPORTING FACTS: The Sentencing Court sentenced Petitioner to 240 months based on facts not found by the jury beyond a reasonable doubt.

AO 243 (Rev. 2/95)

(e) On appeal Same

(f) In any post-conviction proceeding \_\_\_\_\_

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: \_\_\_\_\_

(b) Give date and length of the above sentence: \_\_\_\_\_

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

\_\_\_\_\_  
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Movant